85-791

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1985

PAUL O'DELL,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Defendant deprived of due process by the trial court's consideration and admission into evidence of alleged co-conspirator statements in determining whether the existence of a conspiracy was demonstrated by a preponderance of the evidence, or should the trial court have made its determination of whether a conspiracy existed solely on the basis of evidence independent of the alleged co-conspirator statements?

2. Did the trial court commit reversible error by admitting the alleged co-conspirator statements without making specific findings of fact that (a) a conspiracy existed; (b) the Defendant was a member of the conspiracy; and (c) the hearsay was made in the course and in furtherance of the conspiracy?

3. Did the trial court's jury instructions on reasonable doubt shift the burden of proof to the Defendant, and so dilute the standard of proof as to deny Defendant O'Dell due process of law?

PARTIES TO THE PROCEEDING

Gilbert Bak, Betty Bradley and Glen Cheaves were indicted along with the Defendant. Gilbert Bak and Betty Bradley pled guilty before trial. Glen Cheaves was tried together with the Defendant, and filed a separate appeal from his conviction, and is therefore not a party of this proceeding.

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IN THE
SUPREME COURT OF THE UNITED STATES
January Term, 1985
No.

PAUL O'DELL,
Petitioner,

v.

UNITED STATES OF AMERICA

REFERENCE TO REPORTS

The decision of the Sixth Circuit, the review of which the defense is requesting, has not yet been reported. Please see Appendix A for a copy.

The Sixth Circuit's denial of the defense's Petition for Re-Hearing has not yet been reported. Please see Appendix B for a copy.

The decisions of the trial court were not presented in written form. Please see Appendix C for copies of the pertinent pages from the trial transcript.

STATEMENT OF JURISDICTION

On November 23, 1984, the Sixth Circuit Court of Appeals filed an Order affirming the decision of the trial court. It is this order which the petitioner seeks to have reviewed. On December 26, 1984, the Sixth Circuit Court denied the petitioner's petition for a Rehearing which had been timely filed. The petitioner has filed this Petition for Writ of Certiorari within the 60 days from December 26, allowed by Supreme Court Rule 20.4. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

Constitution of the United States, Amendment XIV, Sec. 1:

"...nor shall any state deprive any person of life, liberty, or property without due process of law..."

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Sec. 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

21 U.S.C. Sec 846:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

21 U.S.C. 841(a)(1):

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance,..."

STATEMENT OF THE CASE

On February 10, 1983, the Defendant, Paul O'Dell was indicted by a federal grand jury, along with alleged co-conspirators Gilbert Bak, Betty Bradley and Glen Cheaves. Gilbert Bak and Betty Bradley eventually pled guilty. Glen Cheaves and the Defendant Paul O'Dell stood trial together, before a jury in the District Court for the Eastern District of Michigan, Southern Division.

In Count One, Defendant O'Dell was charged with conspiring with the above-named persons and other persons, both known and unknown, "to possess with intent to distribute and to distribute various quantities of heroin, a Schedule I, Narcotic Drug Controlled Substance, contrary to the provisions of §841(a)(1), Title 21, United States Code; all in violation of §846, Title 21, United States Code."

Counts Three, Four, Five and Six alleged that Defendant O'Dell did, on various occasions, "knowingly, intentionally and unlawfully aid, abet, counsel, command, procure and induce" the illegal distribution of heroin, in violation of 21 U.S.C. Sec. 841(a)(1).

On May 2, 1983, Defendant O'Dell was convicted on all Five Counts after a jury trial before the Honorable Horace Gilmore.

On January 17, 1984, Defendant O'Dell was sentenced to ten (10) years imprisonment on Count One, and to ten (10) years imprisonment, with five (5) years special parole each on Counts Three through Six, to run concurrently with Count One. Defendant O'Dell was subsequently remanded to custody and is currently serving out his prison term.

At the trial, there was only one Government witness, Agent Schoenrock, who personally contacted any of the alleged co-conspirators. At the outset, the trial court ruled that Agent Schoenrock could testify to out-of-court statements allegedly made by the named co-conspirators, which statements would link Defendant O'Dell to the claimed con-

spiracy. The trial court ruled that if, after the Government had put on its case in chief, it had proven a conspiracy existed by a preponderance of the evidence, it would allow the conspiracy count to go to the jury. If not, the court would declare a mistrial. Over the vigorous objection of defense counsel, the court ruled that it would consider the alleged co-conspirator statements in its preliminary ruling on whether a conspiracy had been proven by a preponderance of the evidence. This ruling was made pursuant to *United States* v. *Vinson*, 606 F.2d 149 (6th Cir. 1979).

At the close of the Government's case, the trial court, considering all the evidence presented, including the alleged co-conspirator statements, ruled that the Government had proven a conspiracy by a preponderance of the evidence. The alleged co-conspirator statements were therefore ruled admissible over defense counsel's standing objection.

In so ruling, the trial court failed to make specific findings of fact in support of the admissibility of the alleged co-conspirator statements.

At the close of the trial, the court charged the jury, and objections were made to several erroneous instructions pertaining to reasonable doubt, on the basis that the reasonable doubt instruction was diluted and that ultimately, the burden of proof was actually shifted, requiring the Defendant to prove his innocence to the jury.

Defendant O'Dell filed a Notice of Appeal from his convictions on August 26, 1983. The defense argued on appeal that the trial court erred in admitting the statements of alleged co-conspirators against Defendant O'Dell. Specifically, the defense argued that the establishment of a conspiracy by a preponderance of the evidence necessary to support the admission of out-of-court statements by alleged co-conspirators, must be made by evidence independent of the statements themselves, and that to consider such statements for the purpose of preliminarily establishing a conspiracy violated the Defendant's Sixth Amendment right to

confront the witnesses against him, thereby depriving him of his right to due process under the Fifth Amendment of the United States Constitution.

The defense also argued on appeal that the trial court committed reversible error by failing to make the specific factual findings that (1) the conspiracy existed; (2) the Defendant was a member of the conspiracy; and (3) the co-conspirator statements were made in the course and in furtherance of the conspiracy, all in support of the admissibility of the alleged co-conspirator statements. In connection with this argument the defense noted that without these specific findings, an appellate court could not determine whether, in fact, the Government had preliminarily proven a conspiracy as to all of the factors required by *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978).

Also raised in Defendant O'Dell's appeal was the reversible error inherent in the numerous erroneous instructions to the jury regarding the reasonable doubt standard of proof. The trial court variously instructed the jury that guilt is to be "clearly established", requiring "full and satisfactory proof" of guilt, and that "strong and satisfactory" evidence is necessary to sustain a guilty verdict. The trial court further instructed the jury that a "reasonable doubt is a fair doubt growing out of the testimony of the case", and that the jury must have an "abiding conviction to a moral certainty" to find the Defendant guilty. On appeal, the defense argued that these combined numerous erroneous instructions, had the ultimate effect of diluting the burden of proof, as well as shifting the burden to the Defendant.

On November 23, 1984, the Sixth Circuit filed an Order which affirmed the decision of the trial court. The defense subsequently filed a Petition for Re-hearing along with a Motion to File Petition for Re-hearing Out-of-Time, which Motion was granted by the Court of Appeals. On December 26, 1984, the Sixth Circuit filed an Order denying Defendant's Petition for Re-hearing. This timely Petition followed.

REASON FOR ALLOWING THE WRIT

As noted above, the trial court's ruling that it would conditionally admit alleged co-conspirator statements into evidence, and would consider the statements themselves in the preliminary proof of a conspiracy to support the admissibility of those statements, was made on the authority of the Sixth Circuit's ruling in *United States* v. *Vinson*, *supra*. The defense contends that in order to comport with the Sixth Amendment Right of the Defendant to confront the witnesses against him, it is necessary to prove the existence of a conspiracy by a preponderance of evidence which is *independent* of the co-conspirator statements themselves. Such is the traditional approach, and the *Vinson* departure from the rule of proving conspiracy in support of the admission of co-conspirator statements is a denial of the criminal defendant's Fifth Amendment right to due process of law. *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. (1942).

The issue is critical in this particular case because, aside from Agent Schoenrock's testimony, which derived from his direct undercover contacts with the alleged co-conspirators, the only other Government witnesses were surveillance officers, who did not personally take part in any of the alleged drug transactions. It is, therefore, at least questionable whether the Government would have been able to prove a conspiracy by a preponderance of *independent* evidence in support of admitting the alleged co-conspirator statements.

The consideration of the alleged co-conspirator statements in the preliminary ruling on the existence of a conspiracy caused substantial and irreparable prejudice to Defendant O'Dell. In addition, it should be noted that there now exists a clear split in authority amont the circuit courts of appeal regarding the issue raised by the defense herein. (Compare e.g. *United States* v. *Vinson*, *supra*., with *United States* v. *Macklin*, 573 F2d 1046, 1048 (8th Cir. 1978). The controversy arises from varying interpretations of Rule 104,

Federal Rules of Evidence. This specific issue has never been resolved by this Court. For the reasons stated herein, this Court should issue a writ of certiorari to consider whether, in order to admit co-conspirator statements into evidence, it is necessary for the Government to prove the existence of a conspiracy by a preponderance of evidence which is independent of the co-conspirator statements themselves, and to consider what actions pursuant to its powers of supervision it should take.

The second Question Presented for Review concerns the trial court's failure to make specific factual findings required in support of the admissibility of out-of-court co-conspirator statements. The findings are required by Rule 801(d)(2)(e), as interpreted and re-enforced by the Sixth Circuit in *United States* v. *Enright*, supra. The defense contends that in order to protect the criminal defendant's Sixth Amendment Right to confront the witnesses against him, it is necessary that the trial court go beyond a preliminary finding that a conspiracy has been proven by a preponderance of the evidence. It is also necessary th t the trial court determine (1) that the defendant was a part of the conspiracy, and (2) that the statements proferred by the Government were made in the course and in furtherance of the conspiracy. Having failed to make these specific findings, an appellate court is unable to determine, if, in fact, the Defendant's right to confront witnesses has been adequately protected, thereby raising a serious question of Constitutional dimension. The Sixth Circuit failed to specifically address this issue because no objections was specifically made on these grounds at trial. The defense contends, however, that appellate review is appropriate, because the error raised herein is one that deprived Defendant O'Dell of a fundamental right — the right to confront witnesses against him and therefore amounted to a substantial denial of due process. For this reason, this Court should issue a writ of certiorari to consider what actions pursuant to its powers of supervision it should take.

The third Question Presented for Review addresses the series of erroneous jury instructions on the reasonable doubt standard of proof, and the shifting of the burden of proof to the Defendant by the trial court's charge to the jury.

As this Honorable Court stated in *In Re Winship*, 397 U.S. 358 (1970), the necessity of an accurate charge on the reasonable doubt standard is one of constitutional magnitude. When that constitutionally mandated protection is not afforded a criminal defendant, there is a clear deprival of due process of law, requiring reversal of conviction resulting therefrom.

In addition to those instructions to which this Honorable Court is cited, *supra.*, at pp. 17-18, it should be noted the jury was further instructed "not to go beyond the evidence to hunt for doubts", and that a "reasonable doubt is fair doubt growing out or the testimony of the case". Thus, in addition to watering down the reasonable doubt standard of proof, the burden of proof was shifted to the Defendant, who had no obligation to present any evidence whatsoever in his defense.

The jury must be accurately instructed about the reasonable doubt standard; the jury must clearly understand that the *entire* burden of proof rests upon the Government, and that *lack* of evidence can in fact warrant an acquittal. The trial court failed to clearly instruct the jury in this regard. For this reason, this Court should issue a writ of certiorari to consider what actions pursuant to its powers of supervision it should take.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

A-1

Court of Appeals Opinion
(Filed Nov. 23, 1984)

No. 84-1098

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellant

v.

PAUL O'DELL
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: JONES, and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge

PER CURIAM. Appellant appeals from his criminal conviction of conspiracy to possess heroin with intent to distribute, conspiracy to distribute heroin, and aiding and abetting another in the distribution of heroin. For the reasons stated herein, we affirm.

Appellant, Paul F. O'Dell was indicted by a federal grand jury, on February 10, 1983, in five counts of a six count indictment. On April 2, 1983, O'Dell and co-defendant Glen Cheaves were brought to trial before a jury.

The government's case against O'Dell was primarily based upon the testimony of Special Agent Dennis Shoenrock, of the Drug Enforcement Agency, who participated undercover in several drug transactions involving O'Dell. Through an informer, Shoenrock met with Gilbert Bak to arrange to purchase heroin. After purchasing heroin from O'Dell through Bak on three occasions, Shoenrock next met with O'Dell personally and informed him that he no longer wanted to purchase heroin through Bak. O'Dell arranged for Schoenrock to meet co-defendant Cheaves and then indirectly sold heroin to Schoenrock through Cheaves. Schoenrock was never immediately present at any of the

exchanges of heroin between O'Dell and Bak and Cheaves. On May 2, 1983, the jury returned a verdict of guilty against O'Dell on each of the five counts of the indictment. The district court sentenced O'Dell on January 7, 1984. This direct appeal follows.

O'Dell maintains that he was denied his Sixth Amendment right to confrontation because the district court followed *United States* v. *Vinson*, 606 F.2d 149 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). Pursuant to *Vinson*, the district court allowed Schoenrock to testify to numerous out-of-court statements by O'Dell's co-conspirators. At the close of the government's case, the district court ruled that the government had established the admissibility of those statements by a preponderance of the evidence, as required by *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978).

O'Dell asks the Court to "reexamine the wisdom of its holding in *Vinson*." The rule of Vinson is predicated on Federal Rule of Evidence 104(a), which provides that in ruling upon a question of the admissibility of evidence the court "is not bound by the rules of evidence except those with respect to privleges." *Vinson* treats enactment of Rule 104(a) as modifying prior law to the contrary. *Vinson*, 606 F.2d at 153.

The Sixth Circuit has rejected challenges to *Vinson*, or relied on it's rule, in numerous cases. *See e.g.*, *United States* v. *Taylor*, 657 F.2d 92, 93 (6th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *United States* v. *Hamilton*, 689 F.2d 1262, 1269 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983); *United States* v. *Hancock*, 703 F.2d 982, 983 (6th Cir. 1983); *United States* v. *Arnott*, 704 F.2d 322, 325 (6th Cir.), *cert. denied*, 104 S.Ct. 364 (1983). *Vinson* is thoroughly established in this Circuit.

O'Dell also contends that *Enright*, not only establishes the standard of proof for admission of co-conspirator hear-

say, but also requires the district court to satisfy that standard by making findings of fact expressly on the record. He did not object on this basis to the district court's admission of the hearsay evidence. Under Federal Rule of Evidence 103(a)(1), preservation of a claim of error requires timely and specific objections to the admission of evidence. Where a party objects generally or objects on specific but incorrect grounds, the district court properly overrules the objection and the party may not substitute a new ground on appeal. *United States* v. *Bennett*, 409 F.2d 888, 898 (2d Cir), *cert. denied*, 396 U.S. 852 (1969). Therefore, we do not reach the merits of O'Dell's contention on appeal.

Similarly, O'Dell has not preserved, under Federal Rule of Criminal Procedure 30, any objection he may have had to the district court's jury instructions on credibility of testimony. O'Dell is not well served by his attorney's assertions, during oral argument before this Court, that a specific instruction had been requested and an objection based upon its absence.

O'Dell also contends that the district court's instruction on reasonable doubt contained several misstatements of law which, in combination, misled the jury regarding the correct standard of proof applicable in criminal cases. O'Dell adopted co-defendant Cheaves' objections to this instruction. The district court overruled the defendants' objections to his instruction.

Jury instructions must be reviewed as a whole and the impact of any single statement should be considered in context. *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973). "[I]f the charge as a whole does amply and fully define the appropriate standard, slightly misleading statements, standing alone, or in isolation, will not constitute plain error." *United States* v. *Buffa*, 527 F.2d 1164, 1166 (6th Cir. 1975); *cert.*

denied, 425 U.S. 936 (1976). We do not find that the district court's instructions, viewed as a whole, were misleading.

Accordingly, we AFFIRM the judgment below.

ISSUED AS MANDATE: January 3, 1985

COSTS: NONE

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By /s/ Tom Berrigan
Deputy Clerk

APPENDIX B

Order
(Filed Dec. 26, 1984)

No. 84-1098

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. ORDER

PAUL O'DELL
Defendant-Appellant

Defendant-Appellant has petitioned the Court to rehear its decision of November 23, 1984, affirming the judgment of the district court.

The Court has considered the petition for rehearing in support thereof. Finding no issue of law or fact which was overlooked or misapprehended, the petition is found not to be well-taken.

It is therefore, ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN HEHMAN, *Clerk*

APPENDIX C

C-1

Excerpts from Trial Transcript
(April 27, 1983)

EXCERPTS FROM TRIAL TRANSCRIPT

(Filed April 27, 1983)

* * *

(3)

Detroit, Michigan
Wednesday, April 27, 1983

(The hearing of the cause resumed pursuant to the adjournment of Tuesday, April 26, 1983.)

IN THE ABSENCE OF THE JURY

THE COURT: You have something you wanted to bring up before we brought the jury?

MR. FAIR: Yes, your Honor.

Your Honor, it is my understanding that Mr. Donaldson intends to introduce into evidence in his case in chief co-conspirator statements against my client, Mr. Cheaves, and I believe against Mr. Paul O'Dell also. We would just ask that we take this up up front, to get a clear understanding how Mr. Donaldson is going to proceed in this matter.

Under *United States* v. *Vinson*, a Sixth Circuit case, it is our feeling that number one, the Court should rule in advance, and given our position, which way the Court should rule in this matter, we believe that nonhearsay testimony should not be — hearsay testimony should not be allowed in as testimony, and see if the Court — see if Mr. Donaldson can prove that there is a conspiracy.

THE COURT: Well, the law is (4) very simple. Once I have made a finding that there is a conspiracy, a preliminary fact finding of conspiracy, I make that by a preponderance of the evidence, then the hearsay statements of the co-conspirators are admissible.

What do you have to say on this?

MR. DONALDSON: Your Honor, the Government would say that under *United States* v. *Vinson* what we

would ask the Court to do, as all the other Courts and this Court has done before, which *Vinson* permits, that the Government be allowed to introduce the co-conspirators' statements.

THE COURT: I will after I make the preliminary fact determination, but he wants me to make the preliminary fact determination now.

MR. DONALDSON: Under *Vinson* you are allowed to consider those statements in making your determination; therefore, you have the alternative of dismissing the case if we don't meet our burden.

THE COURT: In other words what you are asking, and I have done this before, to allow the statements in and let them be used as part of my determination of whether there has been a conspiracy established, and once that has been done, once you are finished, if I find you haven't established a conspiracy, (5) to dismiss the conspiracy Count.

MR. DONALDSON: Yes, your Honor.

THE COURT: What do you have to say to that?

MR. FAIR: I think the Court under *Vinson* could have a hearing up front and find out what the statements are.

THE COURT: I know I could but I have never done that. They have got their penalty. I mean what is wrong with that? If they don't follow through and satisfy me before they rest that they have proved a conspiracy, then you have got an absolute right to stand up and say they haven't and I want the conspiracy Count dismissed. I would have no hesitation to do it if they don't follow through.

MR. FAIR: Our second concern is during the time these co-conspirators' statements are coming in, we are going to be objecting and then Mr. Donaldson is going to stand up and say co-conspirator exception.

THE COURT: Well, don't say co-conspirator exception. Let's use another euphemism.

MR. DONALDSON: I think if they have a standing objection.

Excerpts from Trial Transcript
(April 27, 1983)

THE COURT: Do you want to have (6) a standing objection to the co-conspirators' statements and you won't have to make it and protect your record on that?

MR. FAIR: That is fine.

THE COURT: You would join in it?

MR. HOWARD: Yes.

THE COURT: You have a standing objection to the co-conspirators' hearsay statements. I will let them in but upon the representation of the Government that they are going to prove sufficient conspiracy to allow them in. When they rest if they have not proved sufficient conspiracy to allow them, then I will have no choice but to dismiss that Count. I will certainly entertain your motions if they haven't.

MR. HOWARD: I would like to say this on the record also. That the U.S. Attorney must recognize, in view of his posture in connection with this issue, that he has put himself in a position where the Court very well could dismiss all of the Counts.

THE COURT: This only goes — oh, you mean because the hearsay may spill over into the other Counts?

MR. HOWARD: Yes.

THE COURT: That is a possibility too. Are you willing to assume the risk?

(7)

MR. DONALDSON: I am not conceding the Court should but I am aware of the possibility.

THE COURT: Do you have something else?

MR. FAIR: Your Honor, there is one other matter I would like to put on the record. My client has indicated to me that he believes some jurors saw him in this building with handcuffs on.

THE COURT: What do you propose that I do about it if they did? You don't want me to inquire of them, do you? I think that would be more prejudicial than helpful.

MR. FAIR: Well, your Honor, that may be inappropriate to do that, but our biggest concern is that jurors not see him.

Excerpts from Trial Transcript
(April 27, 1983)

THE COURT: I will ask the marshalls to be sure not to handcuff him until we get the jury out of sight.

MARSHALL: your Honor, I was aware of what may have happened. Some jurors were walking to the juryroom when we were bringing Mr. Cheaves up. I don't know whether they in fact took notice of the fact of who he was much less in custody, but something I suggested to your Clerk is perhaps the jury be instructed to get here even by 10 minutes to 9 so we can come up* * *

(320)

* * * important with our defense, and it is quite necessary.

THE COURT: Well, whether they have the equipment or not, it is irrelevant. The testimony is they did not record anything. Every witness was asked that and they said none was recorded. You have made your statement.

MR. FAIR: I believe they testified they didn't know.

THE COURT: You had another matter you wanted to take up, sir.

MR. FAIR: Your Honor, the second matter was the matter we brought up before testimony was taken. It is the question of the co-conspirator's statements. It is our position that is hearsay and inadmissible.

THE COURT: Well, I will find by a preponderance of the evidence that there is sufficient evidence to establish a conspiracy, and that being so, the hearsay declarations of the co-conspirators are admissible. I will make that finding.

MR. FAIR: Your Honor, for the record, can I ask the Court if the Court used the *Vinson* standard in making its determination? In other words, did the Court take into consideration the (321) co-conspirator statements that were introduced into evidence or testified to on the stand in making its decision that there was a conspiracy?

THE COURT: I heard sufficient evidence, sir, to determine that there is sufficient evidence of a conspiracy to admit the statements. I think that is the only finding I have to make.

Excerpts from Trial Transcript
(April 27, 1983)

MR. FAIR: Well, we would like to put on the record that if the Court took into consideration the co-conspirator statements that were hearsay, that we object to the Court's ruling in that we believe *Vinson* was incorrectly decided in that they do not allow us to cross-examine the maker's of that statement and it is a violation of the constitutional rights.

THE COURT: Well, sir, I suggest that you better take that up with the Sixth Circuit and not with me.

MR. FAIR: We want to make a record, your Honor.

THE COURT: Do you have anything else?

MR. HOWARD: Before we move on to another matter —

THE COURT: (Interposing) Let me (322) see if Mr. Fair has anything else and then I will hear what you have to say.

MR. FAIR: I just want to make sure that our objection is a confrontation clause objection to the Constitution.

THE COURT: All right. Do you have anything else, Mr. Fair?

MR. FAIR: The next matter, your Honor, is at this time we would make a motion for judgment of acquittal with respect to Glen Cheaves. I believe the evidence has shown that Mr. Cheaves met with a number of individuals on the 17th, the 25th and 26th of May of last year. Mr. Cheaves talked to Mr. O'Dell who met with a number of other unidentified individuals and he met with Mr. Schoenrock.

With respect to the testimony which would indicate that Mr. Cheaves has met with all these individuals, other than Mr. Schoenrock there is absolutely no indication that there has been a conspiracy involved and there has been no indication that there was distribution of heroin other than the testimony of Mr. Schoenrock.

When you take into consideration the testimony of Mr. Schoenrock, Mr. Schoenrock's testimony is highly noncredible. mr. Schoenrock has * * *

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Excerpts from Trial Transcript
(April 27, 1983)

(325)

* * * from the bottom. It reads, "Nor can a person conspire with an agent of the government."

THE COURT: No, I don't think I will give that statement, that charge, no.

MR. FAIR: Thank you, your Honor.

THE COURT: Do you have anything, Mr. Howard?

MR. HOWARD: First, your Honor, in connection with *Vinson* and *Enright*, I wanted to join in counsel's motion. I assume, just to clarify the record from my standpoint, as the Court indicated, it made its determination on the basis of all of the information that was introduced.

Secondly, I would like to make a motion to dismiss. Without arguing the facts, you have heard the facts, Judge, the Prosecution has the burden which it must meet at this time, it has not met the burden against my client, and for that reason, without discussing the facts with you, I submit that the charges against my client should be dismissed.

THE COURT: I think there is sufficient evidence against your client on all counts. Let's take a few minutes and then we will proceed.

MR. HOWARD: Fine.

THE COURT: We will take a short * * *

(471)

* * * with distribution of heroin on or about May 26th, and Paul O'Dell, with aiding and abetting in the distribution of heroin on or about May 26th, 1982.

To all of these counts the Defendants have pleaded not guilty and, of course, that creates the issue of fact which you, ladies and gentlemen of the jury, will have to determine.

As I said earlier, I will furnish a verdict roll to you that will sort out these counts and you will have it before you.

I neglected to say at the beginning of the charge, if at any time you want any of the exhibits, you may have them in your juryroom merely by asking for them.

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Excerpts from Trial Transcript
(April 27, 1983)

Now, ladies and gentlemen of the jury, in all criminal cases the Defendant is presumed to be innocent. This legal presumption of innocence is not a mere form to be disregarded by you but it is a substantive part of the law and continues with the Defendant until you are satisfied of his guilt beyond all reasonable doubt.

The Defendant is not required to prove his innocence but the Government must establish his guilt beyond any reasonable doubt. This applies in all criminal cases to every material fact connected (472) with the case. If, after all the evidence is before you, you still have a reasonable doubt of the guilt of the Defendant, it is your duty to acquit him.

The burden of proof rests upon the Government and the Government must prove by testimony and beyond a reasonable doubt a state of facts that will justify a conviction.

Guilt is not to be lightly assumed from the proof, but it is to be clearly established, or as the law says, beyond a reasonable doubt. In other words, the proof in the case must be such as to clearly show the guilt of the Defendant and not be reasonably consistent with any other theory than that of guilt.

In criminal cases full and satisfactory proof of guilt is required and no mere weight of evidence will warrant a conviction unless it be so strong and satisfactory as to remove from your minds all reasonable doubts of the guilt of the accused.

In considering the case, you are not to go beyond the evidence to hunt for doubts nor should you entertain such doubts as are merely fanciful or based on groundless conjecture.

A reasonable doubt is a fair doubt growing out of the testimony of the case. It is (473) not a mere imaginary, possible or captious doubt. There are very few things in this world outside of certain mathematical propositions that are capable of absolute demonstration. So a reasonable doubt is such a doubt as may leave your minds, after a careful exam-

ination of all of the evidence in the case, in that condition that you cannot say that you have an abiding conviction to a moral certainty of the guilt of the Defendant.

Now I want to charge you first, ladies and gentlemen, on the conspiracy count in which both Defendants O'Dell and Cheaves are charged. The law says that if two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to affect the objects of the conspiracy, each is guilty of an offense.

A conspiracy is a combination or agreement by two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of partnership in criminal purposes in which each member becomes the agent of every other member of the conspiracy.

The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey the law.

The evidence in the case need * * *

(483)

* * * voluntarily and intentionally and not because of mistake, accident, or any other innocent reason.

An act is wilfully done if done voluntarily and intentionally and with a specific intent to do something which the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Now, ladies and gentlemen of the jury, you are the sole judges of the credibility of the witnesses and the weight and value to be given to each witness' testimony.

In weighing the witness' testimony, you may take into consideration that witness' interest, bias or prejudice, if any; that witness' relationship to the parties in the case; the probability or improbability of the testimony given by the witness. You may consider all other facts and circumstances in evidence which in your judgment would add to or detract from the credibility or weight to be given to a witness' testimony.

Excerpts from Trial Transcript
(April 27, 1983)

In weighing the testimony of a witness, you have the right to consider his or her candor or fairness, manner or bearing while testifying before you, the reasonableness of his or her story, the means and opportunity the witness had of knowing (484) the facts about which he or she testifies, the consistency of the testimony with other known facts in the case, and you may consider all other matters that tend to impress your minds with the truth or untruth of a witness' testimony.

If there is a conflict in the testimony of witnesses, it is your duty to say where the truth lies. I further charge you that if you find that any witness has wilfully lied as to any material portion of his testimony, you may totally and completely disregard all of the testimony of that witness.

Now there are two types of evidence from which you may find the truth as to the facts of the case, direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a Defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. After weighing all the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find him not guilty.

* * *

(488)

THE COURT: (Interposing) All right. Let me straighten that out.

MR. DONALDSON: Did you give a presumption of innocence? I don't recall that.

THE COURT: Oh, yes, I sure did.

Wait until I find No. 26. The fourth paragraph. I see. I made that mistake and I will also correct the one where you

* * *

said I misstated that. I did not intend to on burden of proof, so I will correct that.

MR. DONALDSON: And I didn't recall whether or not you gave the instruction on the definition of distribute.

THE COURT: Yes, I did.

MR. DONALDSON: Okay.

THE COURT: All right, Mr. Fair.

MR. FAIR: Your Honor, my first objection is that the Court stated that the jury should have an abiding conviction to a moral certainty in order to convict.

THE COURT: That is correct.

MR. FAIR: It is our position that that instruction is confusing and it may be misleading to the jurors.

THE COURT: Well, sir, I have (489) given that instruction for 26 years and I have never had a jury ask me what I meant by it nor have I ever been reversed for that instruction. I have been reversed for a lot of things but never for that one.

What else?

MR. FAIR: Secondly, instructing the guilt must be clearly established and full and satisfactory proof of guilt is required, we object to that because it sort of waters down the reasonable doubt standard.

THE COURT: I don't think it does it any way. I think when I say you have got to clearly establish it beyond a reasonable doubt, that is perfectly clear.

MR. FAIR: Also, the Court informed the jury that reasonable doubt is a fair doubt growing out of the testimony of the case. The jury should also have been instructed that reasonable doubt can grow out of the lack of evidence also.

THE COURT: Well, any more objections on presumption of innocence, burden of proof or reasonable doubt I will not entertain. The instruction I gave today is one that literally I have given for 26 years. That has been tested in the appellate courts. I have never had a jury raise a question on it.

Excerpts from Trial Transcript
(April 27, 1983)

(491)

* * * Sir?

MR. FAIR: No. 17, the testimony of the law enforcement officer is entitled to no greater weight than that —

THE COURT: (Interposing) I think I have covered credibility, Mr. Fair, in my credibility charge and I think that covers a law enforcement officer as well as anyone else.

MR. FAIR: And the sentence finished "simply because he is a law enforcement officer."

THE COURT: I know what it is and I think I have covered that.

Do you have anything, Mr. Howard?

MR. HOWARD: Yes, your Honor.

First of all, I would like to adopt on the record that I have filed my own request to charge and I would like to adopt co-counsel's —

THE COURT: (Interposing) You filed some of your own?

MR. HOWARD: Yes, your Honor.

THE COURT: You want to adopt his, too?

MR. HOWARD: Yes, your Honor, and adopt all of the objections he has made up to this point.

No. 85-791

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

PAUL O'DELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erroneously admitted certain hearsay testimony and failed to instruct the jury properly on the necessity of finding guilt beyond a reasonable doubt.

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. 846, and on four counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent 10-year terms of imprisonment on each count and to concurrent five-year special parole terms on the substantive counts.

The evidence at trial showed that petitioner was a central participant in a heroin distribution ring. To establish petitioner's role in the scheme, a government agent testified to a

number of incriminating statements made by petitioner's co-conspirators (Pet. App. A2). The agent also testified that, on several occasions, he had observed petitioner arrive at the site of a heroin transaction and converse with the dealer immediately prior to the transaction (Tr. 14, 206-207, 273-276); that he had seen a dealer obtain heroin from petitioner's car while petitioner was in the car (Tr. 23-25); that he had seen a dealer hand petitioner cash in exchange for heroin (Tr. 32-34); and that petitioner had arranged for a dealer to sell the agent a substantial quantity of heroin (Tr. 37-43).

Prior to trial, defense counsel objected to the introduction of the co-conspirator statements (Pet. App. C1). Pursuant to *United States* v. *Vinson*, 606 F.2d 149 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980), however, the district court permitted the agent to testify to the statements. The court indicated that, if the government's case-in-chief proved the existence of a conspiracy by a preponderance of the evidence, it would allow the conspiracy count to go to the jury; if the evidence did not rise to that level, the court would declare a mistrial (Pet. App. C2-C3).

At the close of the government's case, the district court ruled that the government had established the existence of a conspiracy by a preponderance of the evidence and that the co-conspirator statements accordingly were admissible (Pet. App. C4). In response to defense counsel's inquiry whether it had relied on the disputed co-conspirator statements in finding that a conspiracy existed, the district court responded: "I heard sufficient evidence, sir, to determine that there is sufficient evidence of a conspiracy to admit the statements. I think that is the only finding I have to make" (*ibid.*)

2. The court of appeals affirmed in an unpublished opinion. The court rejected petitioner's invitation to reconsider the *Vinson* holding, noting that the Sixth Circuit had

repeatedly upheld use of the *Vinson* approach. Pet. App. A2 (citing *United States* v. *Taylor*, 657 F.2d 92, 93 (6th Cir.), cert. denied, 454 U.S. 1086 (1981); *United States* v. *Hamilton*, 689 F.2d 1262, 1269 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); *United States* v. *Hancock*, 703 F.2d 982, 983 (6th Cir. 1983); *United States* v. *Arnott*, 704 F.2d 322, 325 (6th Cir.), cert. denied, 464 U.S. 948 (1983)). The court of appeals also rejected petitioner's contention that the district court should have placed findings of fact about the existence of the conspiracy on the record, holding that petitioner had failed to preserve this objection (Pet. App. A2-A3). And the court of appeals concluded that the district court's jury instructions on reasonable doubt, when viewed as a whole, were adequate (*id.* at A3-A4).

3. Petitioner contends (Pet. 6-7) that this Court should grant the petition in this case to resolve an asserted conflict in the circuits on the question whether a district court may rely on the co-conspirator statements themselves when determining whether the existence of a conspiracy has been established by a preponderance of the evidence.[1] Petitioner fails to recognize, however, that the challenged statements here would have been deemed admissible in any circuit because the existence of a conspiracy—and petitioner's participation in it—was convincingly established by

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[1]In determining whether the existence of a conspiracy has been established by a preponderance of the evidence, and that co-conspirator statements therefore are admissible, the Sixth Circuit permits district courts to consider the challenged statements themselves. See *Vinson*, 606 F.2d at 153. A number of other circuits require district courts to find the existence of a conspiracy without regard to the hearsay. See, *e.g.*, *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660, 665 (3d Cir.), cert. denied, 449 U.S. 960 (1980); *United States* v. *Macklin*, 573 F.2d 1046, 1048 n.2 (8th Cir.), cert. denied, 439 U.S. 852 (1978).

independent evidence. Petitioner was observed directly participating in at least one heroin transaction; he arranged a second transaction at an undercover agent's request; and he appeared to play a role in a number of other sales. There accordingly was no need for the district court to consider the statements made by the co-conspirators in this case.[2]

Petitioner's additional contentions do not warrant further review. His argument (Pet. 7) that the district court failed to make adequate findings on the record prior to admitting the co-conspirator statements is frivolous, given the strength of the evidence of conspiracy; in any event, his objection was not preserved. See Fed. R. Evid. 103(a)(1). Petitioner's challenge to the jury instructions (Pet. 8) similarly lacks merit. The district court explicitly charged the jury that "[t]he [d]efendant is not required to prove his innocence but the Government must establish his guilt beyond any reasonable doubt" (Pet. App. C7). The court of appeals accordingly found that the instructions, viewed as a whole, were not misleading; nothing in that factual conclusion deserves further consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

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[2]Indeed, the district court did not make clear whether it in fact relied on the co-conspirator statements in making its admissibility determination.

DOJ-1986-04